

**SJN THOMAS MANIVELLO**

*a*

**v.**

**LT KOL DIN YATI DAHLAN & ORS**

COURT OF APPEAL, KUALA LUMPUR

*b*

SHAIK DAUD ISMAIL JCA

NH CHAN JCA

MAHADEV SHANKAR JCA

[CIVIL APPEAL NO: W-01-27 OF 1995]

21 OCTOBER 1996

*c*

**ADMINISTRATIVE LAW:** Remedies - Certiorari - Application for - Whether court-martial had committed jurisdictional error and acted in excess of jurisdiction - Contravention of s. 144(1) of the Armed Forces Act 1972

**ADMINISTRATIVE LAW:** Remedies - Certiorari - Application for - Whether appellant required to exhaust his right of appeal - Armed Forces (Court-Martial) Rules 1976, r. 101

*d*

**CRIMINAL PROCEDURE:** Trial - When a trial begins and when it commences - Whether trial begins when charge is read - Whether commences only with examination of witnesses - Armed Forces Act 1972, s. 144(1)

*e*

**WORDS & PHRASES:** "Trial" - When a trial begins and when it commences

The appellant was *inter alia* alleged to have offended s. 49(b) of the Armed Forces Act 1972 ('the Act') for using threatening words on his superior on 24 August 1986. On 16 February 1989, the appellant was produced before the Military Court whereupon the charge was read to him and his plea taken. On 23 June 1990, the Military Court proceeded with the hearing of the case and, having found the appellant guilty of the offence, demoted him to the rank of Corporal.

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The appellant applied by notice of motion to the High Court for an order of *certiorari* to quash the decision, but the application was dismissed on the grounds that there was no jurisdictional error committed by the Military Court, and further that the appellant had failed to comply with r. 101 of the Armed Forces (Court Martial) Rules 1976 ('the Rules') in that he failed to exhaust his right of appeal within the administrative hierarchy. The appellant appealed and argued that the High Court was wrong in refusing *certiorari* as the trial before the Military Court, having commenced more than three years after the alleged offence was committed, was time-barred by s. 144(1) of the Act, and that the said Military Court, therefore, had committed a jurisdictional error

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- a* and acted in excess of jurisdiction. It was further submitted that the High had also erred in its ruling on r. 101 of the Rules. In the circumstances, questions arose before the learned judges herein as to: (i) whether the trial of the appellant before the Military Court was time-barred; and (ii) whether the appellant was dutybound in law to exhaust his right of appeal within the administrative hierarchy.
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**Held:****Per Shaik Daud Ismail JCA**

- c* [1] There are separate meanings given to when a trial begins and when it commences. A trial begins when the charge is read to the accused person and his plea taken but it only commences at the trial proper ie, when the prosecution calls its first witness.
- d* [1a] Nowhere in s. 144(1) of the Act is mentioned the word “commencement of the trial”. The words used instead is “unless the trial is begun within three years”. Therefore for the purposes of s. 144(1) of the Act the trial here began on 16 February 1986 and is thus well within the three years limitation. The Military Court, therefore, had not committed any jurisdictional errors nor had it acted in excess of jurisdiction when it proceeded with the trial on 23 June 1990.
- e* [2] An applicant for *certiorari* is not normally obliged to have exhausted his right of appeal within the administrative hierarchy nor need he have exhausted his right of appeal to a court of law. Therefore it was not necessary, having regards to the facts herein, to resort to s. 101 of the Armed Forces (Court-Martial) Rules 1976. The learned judge was correct when he held that there was no irregularity in the proceedings before the Court-martial.
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*[Appeal dismissed.]*

*g* [Bahasa Malaysia Translation Of Headnotes]

- h* Perayu telah dituduh melanggar antara lain s. 49(b) Akta Angkatan Tentera 1972 ('Akta') kerana menggunakan perkataan berunsur ugutan terhadap pegawai atasannya pada 24 Ogos 1986. Pada 16 Februari 1989, perayu telah di bawa ke hadapan Mahkamah Tentera di mana pertuduhan telah dibaca kepadanya dan akuannya dicatit. Pada 23 Jun 1990, Mahkamah Tentera memulakan pendengaran kes dan, setelah mendapati perayu bersalah, menurunkan pangkatnya kepada pangkat Koperal.

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Perayu memohon melalui notis usul kepada Mahkamah Tinggi untuk suatu perintah *certiorari* untuk membatalkan keputusan, tetapi permohonannya ditolak atas alasan bahawa Mahkamah Tentera tidak melakukan apa-apa kesilapan bidangkuasa, dan perayu juga telah gagal mematuhi k. 101 Armed Forces (Court Martial) Rules 1976 ('Peraturan') bilamana beliau tidak menggunakan sepenuhnya hak untuk merayu dalam hirarki pentadbiran. Perayu merayu dan berhujah bahawa Mahkamah Tinggi silap dalam menolak *certiorari* oleh kerana perbicaraan di hadapan Mahkamah Tentera, kerana dimulakan lebih dari tiga tahun setelah kesalahan yang dikatakan berlaku, sudah dibatasi oleh hadmasa di bawah s. 144(1) Akta, dan Mahkamah Tentera, dengan itu, telah melakukan satu kesilapan bidangkuasa dan telah bertindak melampaui batas bidangkuasanya. Dihujahkan juga bahawa Mahkamah Tinggi turut tersilap dalam kesimpulannya berhubung k. 101 Peraturan. Di hadapan hakim yang bijaksana persoalan penting yang timbul ialah: (i) samada perbicaraan perayu di hadapan Mahkamah Tentera telah dibatasi oleh hadmasa; (ii) samada perayu berkewajipan di sisi undang-undang untuk menggunakan sepenuhnya hak untuk merayu dalam hirarki pentadbiran.

**Diputuskan:****Oleh Shaik Daud Ismail HMR**

- [1] Maksud yang berbeza diberikan kepada bila sesuatu perbicaraan itu "begins" dan bila ianya "commences". Sesuatu perbicaraan "begins" bilamana pertuduhan dibaca kepada orang yang dituduh dan akuannya dicatit tetapi akan hanya "commences" di perbicaraan sebenar ie, bilamana pendakwaan memanggil saksi pertamanya.
- [1a] Perkataan "commencement of the trial" tidak disebut di mana-manapun dalam s. 144(1) Akta. Ungkapan yang digunakan sebaliknya ialah "unless the trial is begun within three years". Oleh itu bagi maksud-maksud s. 144(1) perbicaraan "began" pada 16 Februari 1986 dan berlaku di dalam tempoh tiga tahun hadmasa. Mahkamah Tentera, dengan itu, tidak melakukan apa-apa kesilapan bidangkuasa bilamana ia memulakan pendengaran pada 23 Jun 1990.
- [2] Seseorang pemohon *certiorari* lazimnya tidak berkewajipan untuk menggunakan sepenuhnya hak untuk merayu dalam hirarki pentadbiran mahupun hak untuk merayu kepada mahkamah undang-undang. Oleh yang demikian, mengambilkira fakta di sini, adalah tidak perlu untuk menggunakan k. 101 Peraturan. Hakim yang bijaksana betul bilamana beliau merumuskan bahawa tidak terdapat ketidakteraturan dalam prosiding di hadapan Mahkamah Tentera.

*[Rayuan ditolak.]*

**a Cases referred to:**

*Lai Chang Cheong v. Sowaratnam* [1983] 2 MLJ 113 (*fol*)  
*PP v. Lim Chan Len* [1981] 2 MLJ 41 (*fol*)  
*PP v. Tay Tuan* [1953] 19 MLJ 40 (*refd*)  
*Savrimuthu v. PP* [1987] 1 CLJ 368 (*refd*)

**b Legislation referred to:**

Armed Forces Act 1972, ss. 47, 48, 49(b), 144(1)  
Armed Forces (Court Martial) Rules 1976, r. 101

*For the appellant - Karpal Singh; M/s Karpal Singh & Co*

*For the respondent - Al-Baishah; A-G's Chambers*

**c** [Appeal from High Court, Kuala Lumpur; Originating Motion No: R8-25-143-90]

*Reported by WA Sharif*

**JUDGMENT**

**d Shaik Daud Ismail JCA:**

**e** The appellant filed a Notice of Motion dated 21 March 1992 in the High Court, seeking an order of *certiorari* to quash the decision of the Military Court, Kuala Lumpur dated 26 November 1990 whereby the appellant was found guilty of an offence under s. 49(b) of the Armed Forces Act 1972 and was ordered to be demoted from the rank of Sergeant to Corporal.

**f** At the Military Court appellant faced six charges under the Armed Forces Act 1972 for offences alleged to be committed on 24 August 1986. He was acquitted of five of the charges but found guilty of the first charge, which is under s. 49 of the Act of 1972 for using threatening words on a superior. The High Court found that there were no jurisdictional errors for it to interfere by issuing a *certiorari* and thereby dismissed the appellant's Notice of Motion. Hence this appeal.

**g** Although several grounds of appeal were put up but at the outset of the appeal learned counsel for the appellant, Mr. Karpal Singh, resorted to only two of the grounds. Firstly he contended that the learned judge erred in law in not holding that the Court Martial committed a jurisdictional error and acted in excess of jurisdiction when it proceeded with the hearing on 23 June 1990 in contravention of the provisions of s. 144(1) of the Armed Forces Act 1972.

**h** Secondly, it is contended that the learned judge erred in law in concluding that the appellant failed to comply with r. 101 of the Armed Forces (Court Martial) Rules 1976 in that he failed to exhaust his right of appeal within the administrative hierarchy.

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With respect to the first ground let us, therefore, examine s. 144(1) of the Armed Forces Act 1972, which provides that:

(1) No person shall be tried by a Court-Martial for any offence, other than one against Section 47 or Section 48 or desertion unless the trial begun within three years after the commission of the offence ...

This section, therefore, set a limitation of time for trial of offences under the Armed Forces Act 1972 except for offence under ss. 47 and 48 and for desertion. It is clear that a Court-martial has no jurisdiction to proceed with a trial three years after its commission, and if it is shown that the Court-martial in fact proceeded with the trial of offences after three years of its commission clearly the court would have acted without jurisdiction and therefore *certiorari* would be the remedy. In the present case there is no dispute that the offence comprised in the first charge was committed on 24 August 1986. This is borne out by the affidavit of the appellant affirmed on 31 December 1990 and confirmed by the affidavit of the respondent affirmed on 3 August 1992. It is contended by learned counsel for the appellant that although the appellant was first produced in the court-martial on 16 February 1989 and all the charges were read to him, the trial did not commence then. He contended that the trial commenced on 23 June 1990 when the prosecution called its first witness. The issue before the court is when did the trial of the appellant begun for the purpose of s. 144(1) of the Armed Forces Act 1972? Learned counsel for appellant referred us to a few cases on this issue.

Firstly he referred to the case *PP v. Tay Tuan* [1953] 19 MLJ 40 where the court had to decide when the trial commences with reference to the service of a Chemist report. The High court held that the trial does not commence until his claim to be tried has commenced to be met ie, on the day of the hearing.

From this finding it seems that the trial does not commenced on the day the accused is produced and the charge read to him and he make a plea. Then there is the case of *PP v. Lim Chan Len* [1981] 2 MLJ 41 where the court is asked to determine the same issue this time with reference to a notice of alibi. The High Court held that the meaning of "commencement of the trial" is the commencement of the actual trial itself and not the date when the accused was first charged in court. Then there is the then Supreme Court case of *Savrimuthu v. PP* [1987] 2 MLJ 173 where Salleh Abbas LP (as he then was) at p. 176 states:

- a* Whilst we accept that the trial always begins with the reading of the charge and asking the accused to plead, it does not follow that the trial has commenced once the charge is read and the accused says he claims to be tried or even pleads guilty. It all depends upon the intention and understanding of the court and the parties. The reading of the charge can be a mere matter of formality which is done as a matter of course without any intention to proceed to the trial yet. This happens on the mention date when the court has to fix dates for the trial. But when on the trial date the charge is read, the plea is taken and the prosecution begins to lead evidence, the trial has certainly commenced, and it is commenced naturally with the reading of the charge and the taking of the plea. The reading of the charge is not really the crux of the matter, because even at the continued hearing of part-heard cases the reading of the charge is as a matter of course automatically done. Thus in this context the commencement of trial must mean the commencement of the examination, cross-examination and re-examination of one or more witnesses.
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- On perusal of this finding and that of the other two High Court findings, it seems to me (us) that there are separate meanings given to when a trial begins and when it commences. It also seems to take into consideration the intention and understanding of the court and the parties. Therefore from these decided cases I (we) can come to the conclusion that a trial begins when the charge is read to the accused person and his plea taken but it only commences at the trial proper ie, when the prosecution calls its first witness. Applying this to the present case, I (we) find that nowhere in s. 144(1) of the Armed Forces Act 1972 is mentioned the word "Commencement of the trial". The words used in this section is "unless the trial is begun within three years ..." I (we) find that this is the very phrase used by court in *Savrimuthu v. PP* when Salleh Abbas LP (as he then was) states, "Whilst we accept that the trial always begins with the reading of the charge and asking the accused to plead, ..." Therefore for the purpose of s. 144(1) if the trial in this case is begun ie, when the charges were read to the appellant and his pleas taken, which was on 16 February 1989, it is well within the three years limitation. The record also shows that on the day the charge was read to the appellant ie, on 16 February 1989 and his pleas taken the case was ready to proceed and the first witness would have been called but for an objection raised by the appellant on one member of the panel and after arguments were heard the court replaced two members of the panel and was ready to proceed. At this juncture the defence counsel for the appellant requested for an adjournment on the ground that he was not well versed with the case and the court acceded to the request and adjourned the case to 22 June 1990. From this sequence of events it seems clear to me (us) that for all intents and purposes the trial had begun on 16 February 1989 after two members of the panel were replaced following an objection by the appellant. This also appear to be the intention and understanding of the court and the parties. Therefore, I (we) would hold that
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in the context of this case, and for the purpose of s. 144(1) the trial has begun on 16 February 1989 and is therefore well within the limitation period of three years. To hold otherwise would create a situation where in a case which begins and is ready to proceed say, one week short of three year limitation, the accused person need only request potsponement to catapult the actual hearing beyond the three year limit, thereby thwarting the prosecution and defeating the ends of justice. Surely, this is not the intention of the legislature in enacting s. 144(1).

As for the second ground of appeal ie, s. 101 of the Armed Forces (Court-Martial) Rules 1976, the short answer is to be found in the then Federal Court case of *Lai Chang Cheong v. Sowaratnam* [1983] 2 MLJ 113 where the court held that an applicant for *certiorari* is not normally obliged to have exhausted his rights of appeal within the administrative hierarchy nor need he have exhausted his right of appeal to a court of law. Therefore it is not necessary, having regard to the facts of this case, to resort to that section.

Therefore on the first ground above, I (we) find that the learned judge was correct when he held that there was no irregularity in the proceedings before the Court-Martial. The appeal is therefore dismissed with costs.

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